



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2002

Afterword: The Linkage Problem – Comments on Five Texts

John H. Jackson

Georgetown University Law Center, jacksjoh@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/109>

96 Am. J. Int'l L. 118-125 (2002)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [International Law Commons](#), and the [International Trade Law Commons](#)

GEORGETOWN LAW

Faculty Publications



January 2010

Afterword: The Linkage Problem – Comments on Five Texts

96 Am. J. Int'l L. 118-125 (2002)

John H. Jackson

Professor of Law

Georgetown University Law Center

jacksojh@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/109/>

Posted with permission of the author

AFTERWORD: THE LINKAGE PROBLEM—COMMENTS ON FIVE TEXTS

*By John H. Jackson**

The problem of linkage between “nontrade” subjects and the World Trade Organization is certainly one of the most pressing and challenging policy puzzles for international economic relations and institutions today. It is extensively and harshly debated by political leaders and diplomats, at both the national and the international levels of discourse, and is one of several issues that derailed the WTO Third Ministerial Conference in Seattle in late 1999. It also posed problems for the Fourth Ministerial Conference in Doha, Qatar, in November of 2001, and it threatens to derail the successful functions of the WTO itself.¹

With the ambitious topic assigned to them, the five authors, or groups of authors, have labored heroically to address the problem. The task assigned to me and to some others is to comment on these works. Partly because of time and space constraints, I will not try to deal very much with each work individually but will focus on some overall characteristics of these works and of the subject generally.

The works are in many ways fascinating, and in other ways incomplete. They illustrate how fine minds can approach the same problem in many different ways. Unfortunately, I believe these works offer rather limited amounts of help to the thoughtful struggling practitioner (private, academic, or governmental) in his or her forced quest to solve pressing problems of potential vital consequence to world peace and welfare. I may only add to that confusion and diversity with some of my comments, but toward the end of this note I will suggest yet another approach to the problem at hand.

One can also regret the absence of certain important viewpoints in this set of articles, particularly the absence of a representative of a developing, or least-developed, country, and the absence of views from a government representative, who could bring an important added measure of empirical observation about the current realities of government activity in the international trade system.²

Having expressed some of my concerns, however, let me next briefly comment on what it appears that these five works tell us—or fail to tell us—in their different ways. The divergent approaches make it difficult to generalize, but I will venture a few brief thoughts that come to my mind after reading these works.³

First, most of these works seem to aim at a “top-down” approach, with an attempt by their authors to derive an overall framework of guidance for addressing the question at hand by referring to the basic or “inherent” nature of the WTO as an institution, then using assumptions developed from that reference to deduce the appropriate way to address questions of

* Of the Board of Editors.

¹ See, e.g., statement of WTO Director-General Mike Moore that a second failure of a ministerial meeting to launch a trade round at Doha, Qatar, in November “would certainly condemn us to a long period of irrelevance,” in Frances Williams, *WTO Head Tells Nations ‘to Get Real,’* FIN. TIMES (London), July 31, 2001, at 1. See also John H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 J. INT’L ECON. L. 67 (2001).

² My sympathies are with the organizers, however, because I know how difficult it is to recruit such perspectives for a work like this.

³ The drafts leading to this group of five articles evolved somewhat in the course of publication and are much improved through that process, but this has posed some difficulty for those of us asked to comment on these articles since it has required some rethinking and redrafting of our own comments to attempt (at least) to correlate our remarks to the final versions.

linkage. To some extent, this may have contributed to the rather overly strong "theoretical" flavor of some approaches.

Two of the authors approach the question facing them by looking at the text and nature of the treaty as an institution. One (Charnovitz) seems to focus on the "relation to trade" as both an "inherent subject" question and a "linguistic" approach.⁴ Charnovitz, who has written perceptively on this subject before, clearly seems to have the best command of the extensive relevant literature. He seeks an "analytical framework" to search for a "proper mission," and examines a series of "frames," each of which seems to focus on different normative questions, or linkage, but he eschews "power-oriented" and "strategic" linkage.⁵

Another author (Leebron) approaches this question on a somewhat higher level of abstraction, deriving concepts from "international relations" studies, using specially defined terms such as "issue area," and introducing some important distinctions such as that between "scope" and "link" (although these concepts do not have easily ascertainable dividing lines, so the distinction may not give much guidance).⁶ An extensive taxonomy that he outlines in this article has a number of ideas, which could be useful for analysis of some of the linkage questions, but these may not carry us far enough to solve many of the "trade and . . ." issues (a large number of which, however, may not even be solvable!).

Two other works approach the problem from more of an economist's viewpoint. In one case, a group of authors develop an interesting model of "terms-of-trade externality," with emphasis on the criterion of "market access" to judge the appropriateness of linkage.⁷ It does appear to this commentator that the article falls prey to the "reciprocity fallacy" and a number of other problems.⁸

In the other article, the author (Trachtman) presents a landscape of potential governmental entities (both vertically and horizontally) that might be assigned competence for various subjects.⁹ This approach certainly illustrates the potential complexity of the question posed for this project, and addresses some of the criteria that might motivate various solutions, with illustrations of pragmatic and sometimes economic considerations. Perhaps because my own views set forth elsewhere have some parallels to the thrust of this approach, I find myself more in sympathy with this article.¹⁰

⁴ Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AJIL 28 (2002).

⁵ *Id.* at 30-31.

⁶ David Leebron, *Linkages*, 96 AJIL 5 (2002).

⁷ Kyle Bagwell, Petros C. Mavroidis, & Robert W. Staiger, *It's a Question of Market Access*, 96 AJIL 56 (2002).

⁸ Meaning great overemphasis on "balancing" access commitments as the central policy goal of the trade system. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 147 (2d ed. 1997). Furthermore, it seems quite apparent that the model presented fits hardly any of the real characteristics of the WTO rule system, inter alia: (1) by ignoring the impact of the most-favored-nation obligation on their proposals; (2) by giving little effect to the national treatment obligation and its effect on product standards; (3) by using terms that are ill-defined, e.g., "standards," which seem to be used in at least one paragraph as embracing "subsidies" and in other places as lumping both product standards and process standards together; (4) by not accurately describing the meaning as practiced of "non-violation" cases (itself relying on the extremely ambiguous phrase "nullification or impairment"); and (5) by not realizing the huge potential for manipulation of the "nullification or impairment" phrase and the policy dilemma posed for the norm in Article 3.2 of the Dispute Settlement Understanding that rulings of the Dispute Settlement Body "cannot add to or diminish the rights and obligations provided in the covered agreements." Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, in *WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 354 (1999).

⁹ Joel P. Trachtman, *Institutional Linkages: Transcending "Trade and . . ."*, 96 AJIL 77 (2002).

¹⁰ John H. Jackson, *Sovereignty, Subsidiarity, and the Separation of Powers: The High Wire Balancing Act of Globalization* (Proceedings of conference to honor Prof. Robert E. Hudec, University of Minnesota Law School, Sept. 2000, forthcoming); see also JOHN H. JACKSON, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, in *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 367 (2000). (Trachtman uses the term "jurisdiction," whereas I have used the phrase "allocation of power.")

Finally, a fifth work (by Howse) presents an engaging hypothesis to describe the broad historical sweep of trade policy institutions.¹¹ This is fun to read, and offers some interesting insights (e.g., praise for the WTO Appellate Body's report in *Shrimp/Turtle*), but it relies on a historical hypothesis focusing on "embedded liberalism" and targeting a somewhat restricted elite or "insider network" of policymakers driving that history, whose basis for power he even compares to the Bourbon monarchy's claim to the divine right of kings! Although the role of an elite in the GATT/WTO history has some validity,¹² the broader conclusions of this historical view are not in agreement with those of many other observers, including many with participation and empirical experiences in the trade system. There is not much in this article, however, by way of explicit criteria for judging the appropriate linkage, except the agnostic approach of the implicit judgments critical of the elite history described, plus the expressed view that "all trade is trade and . . .," i.e., that "[t]here is no natural or self-evident baseline or rule that can solve this basic dilemma."¹³ This last expression accords generally with my own view, as the reader can see below,¹⁴ but leads me in a different analytical direction.

I found scattered throughout these works interesting insights and generalizations that ring true, but also many generalizations that do not seem to me to hold up. In general, these works do not spend much time on details of applying the broader concepts developed to specific cases, although some of the manuscripts did include illustrations.

Among these writers, there seems to be some agreement that the WTO as an institution is seriously flawed, in some cases because of important institutional defects such as lack of democratic input, transparency, public participation, and relationship with nongovernmental organizations (NGOs). However, the implication of these defects for "linkage" issues (surprisingly) does not play much of a part in their analyses. Clearly, I share some of these perceptions of defects¹⁵ and I enjoyed the added descriptions and insights developed in these works in relation to this problem.

Overall, I am also dubious about the possibility of deriving an a priori principle or principles from the institutional framework and history of the GATT/WTO system capable of yielding very clear and relatively nondisputable rules or generalizations that would profoundly motivate particular conclusions about the potential functional "competence-scope evolution" of the WTO and its linkages. None of these articles, fortunately, takes the view expressed by some scholars and political/diplomatic leaders that the WTO should "return to and confine itself to the core or central competence of the GATT," which competence they claim is primarily "border measures" relating to trade. This view is seriously flawed because it ignores the GATT/WTO history itself (and the preceding practice of dozens of bilateral trade agreements), which clearly manifests a desire to see that internal governmental measures would not be utilized to undermine the norms of trade liberalization set forth in the agreements. The national treatment clause under GATT Article III is a particularly powerful measure designed to limit internal taxation and regulation to prevent discriminatory measures

¹¹ Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

¹² See Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and the Problems of Democratic Legitimacy*, Paper prepared for the American Political Science Association convention (Aug. 31–Sept. 3, 2001), in which the authors develop a remarkable overview of the post-World War II international economic institutions and note the role of elites in part of that history.

¹³ Howse, *supra* note 11, subhead of part V at 108, and text at note 5 (emphasis omitted).

¹⁴ One personal note here: Howse refers to my view, "All politics is local." In fact, this phrase is derived from the title of a book authored by Tip O'Neil, former Speaker of the U.S. House of Representatives, and I have used this phrase in juxtaposition to another phrase, "all economics is international," which quotes an article by Peter Drucker. I do this to illustrate the tensions about "global economic policies" that are inherent in the democratic and parliamentary procedures of nation-states. See JACKSON, *supra* note 8, at 351 (with footnotes to the origin of those phrases).

¹⁵ Jackson, *supra* note 1; John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998); see also Keohane & Nye, *supra* note 12.

and measures that operate “so as to afford protection” to domestic producers. Astute economic and other kinds of analysts know quite well that thousands of domestic regulatory measures can be used in ways to inhibit competition from outside a nation’s borders.¹⁶

So where does that leave us? Here are a few of my perceptions about the direction that leads to productive inquiry.¹⁷

I will start with a few of my own observations about the evolution of GATT/WTO history. Originally, of course, the GATT was focused on tariff reduction and, over several decades, was remarkably (but not perfectly) successful in that objective.¹⁸ But by the 1970s, it became clear that tariffs were not likely to be the main problem for trade liberalization. As tariffs decreased (especially for industrial goods imported to industrialized countries), many special sector interests began to seek other ways to reduce competition from imports, turning to “non-tariff barriers” (NTBs). These are myriad, and many are the types of things for which human ingenuity can perpetually develop new devices. Most such barriers are internal measures and not border measures, and therefore are often most relevant to the national treatment clause of GATT Article III.

In this respect, the GATT was essentially forced to address nation-states’ internal economic regulatory measures, or run the risk of becoming almost totally irrelevant to the need for international cooperative mechanisms to resolve thousands of international tensions and problems related to trade, or to keep some movement toward trade liberalization. The Tokyo Round (1973–1979) was the first round of negotiations to address NTB issues actively and explicitly, and this resulted in a series of “side codes” addressing particular NTBs, such as the “Subsidies Code” and the “Technical Barriers Code.”¹⁹

The results of the Tokyo Round were a major challenge to the traditional ideas of “reciprocity,” which tended to organize tariff negotiations. For one thing, it becomes almost impossible to “quantify” the different trade treaty results, when the approach is to develop a sort of “code” of rules, which arguably should improve the overall operation of world markets in the long run. Winners and losers are hard to predict. Thus, the rather bizarre proposal in the paper of the three authors to allow nations to “buy” departures from rules with increases in tariffs seems totally inappropriate to the reality of global markets and the development of institutions designed to make those markets work better.

In addition, the logic of these historical observations suggests the potential (at least) of an appropriate role for the trade institution(s) (GATT/WTO or otherwise), which could be very broad, as broad as economic regulation on all levels of government. Furthermore, this logic may well suggest a need to invite under the WTO umbrella subjects such as competition policy, investment rules, or more food security rules, and certainly new concepts of agricultural policy such as “multifunctionality.” It could also suggest a need to develop WTO competence about “adjustment” facilitation measures and maybe even redistribution questions (since these are arguably problems that can be exacerbated by trade liberalization). Attention to environmental or labor standards would not escape if this logic were the only consideration.

Another dimension to this thinking about the appropriate role for international economic institutions is to recognize that the original goals for the GATT (and the failed ITO), articulated, *inter alia*, at the 1944 Bretton Woods Conference and carried into the GATT and ITO discussions, were twofold. The primary goal of this postwar institution building (1944–

¹⁶ See JACKSON, *supra* note 8, at 154 & 383 nn.63, 64, for reference to some inventories of nontariff barriers to trade.

¹⁷ Readers who wish to explore some of these views further can examine references in some of the footnotes above, and John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT’L ECON. L. 1 (1998); John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3 (2000); Jackson, *supra* note 15.

¹⁸ Of course, the GATT was also focused on the elimination of trade quotas (prohibiting them in Article XI), and was not quite as successful in this task. Tariff reductions, by contrast, were the subject of very extensive negotiations; namely, six rounds before 1970.

¹⁹ See also the Tokyo Round agreements on aircraft products, agricultural products, antidumping measures, etc.

1948) was to keep the peace in order to avoid another disastrous world war. The other goal was to enhance world economic welfare (benefiting all nations) and thus "increase the pie," rather than quarrel about how to divide it up. This, too, has implications for defining the role of an international institution. Furthermore, in the last decade or two one can perceive at least two more goals being assigned to the WTO and other institutions: namely, alleviating poverty, and managing the risk of global financial and economic crises.

Where do these considerations put us in trying to set out the boundaries of appropriate "linkage" activity of the GATT/WTO? As already noted, it seems very hard to posit much in the way of "inherent" or "logical" limits that would inevitably mandate the WTO to refrain from almost any economic subject matter. Clearly, the demands of growing economic international interdependence ("globalization") would require some kind of institutional response to the huge numbers of intergovernmental tensions that inevitably arise. Some kind of cooperative mechanism is needed to prevent worse tensions from developing, and also to provide some institutional instruments to help cooperating nations achieve some of the broader goals for the international economy.

How, then, should one approach the question of "limits" on WTO activity? My own tentative thinking, some of it articulated in recent publications,²⁰ is to look upon this question as part of a broadening landscape of issues involving questions related to "sovereignty" and "subsidiarity," which I have described as the tough question of allocation of power (often needing pragmatic analysis and cost-benefit approaches). Should a particular decision be made in Geneva; Washington, D.C.; Sacramento, California; Berkeley, California; or even at a neighborhood level (e.g., zoning)? There is also a horizontal dimension (or several horizontal dimensions) to this landscape: should decisions be made in the WTO, or any one of many other international organizations? And within an organization, should decisions be made primarily by diplomatic negotiation ("rule making") or by a judicial type of tribunal (or even some sort of an executive institution)?²¹

To flesh out the details of a landscape for making these power allocation decisions requires elaborate analysis and no-nonsense empirical studies, weighing not only the apparent or relevant needs for cooperation at an institutional level involving participation by many nations, but also the caliber and character of the available international institutions that might be used. Does a particular institution have the resources or effective participants, or fulfill the important democratic legitimacy criteria,²² or have the means to achieve cooperation between the players so as to be effective both in working toward its goals and in preserving or enhancing other important goals (such as reducing disputes, treating all kinds of societies fairly, enhancing the appropriate efficiency of markets, and granting national societies "margins of appreciation")?²³

Thus, I think the best contribution that could be made by policymakers and academics is to suggest reasonably complete and disaggregated lists of factors that should go into decisions about allocating function and power (in all dimensions), and providing sound empirically based studies of those factors and how they operate or where they are prevented from operating by institutional weaknesses. Perhaps in this more or less pragmatic way, the broader objectives of international cooperation (e.g., to break the "Prisoners' Dilemma") could be enhanced in the future as the world plunges into tighter and tighter interconnec-

²⁰ See the works cited in notes 1, 8, 10, 15, 17 *supra*.

²¹ Jackson, *supra* note 1; Jackson, *supra* note 15. See also the works cited in note 10 *supra*.

²² The paper by Keohane and Nye, *supra* note 12, has an extraordinarily well articulated view of the essential need for attention to various principles of governance (transparency, participation, etc.) in the world trading system (as well as other international economic institutions).

²³ This term is used in the jurisprudence of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221.

tions driven by technological innovations (e.g., in communications and transportation), which few, if any, nation-state governments can control or influence very much.

For the purpose of illustrating some of my points above, I choose the hotly debated question of whether “competition policy” (such as antitrust or anticartel regulation) should be inserted into the GATT/WTO system, i.e., brought under the GATT/WTO umbrella with international treaty norms that would be part of the GATT/WTO system. How should policy-makers go about making this decision?²⁴ A series of questions can be posed, and then I will briefly suggest some approaches for answering those questions. To keep my discussion brief, I will use the term (criticized as ambiguous) “globalization” to refer to a large group of trends implying greater economic interdependence in the world, faster flows of economic forces across nation-state borders, and so forth.

(1) Logically, one can ask whether there is a need for government action at all and how appraisal of that need is affected by globalization.

(2) If there is such a need, can the nation-state governments adequately handle the problems, or is there a need for some sort of international action?

(3) If nation-state governments cannot take adequate action to solve the problems, is there an existing international institutional framework that can assist, or are new frameworks needed?

(4) Are there dangers in allocating authority to any international institutions available or reasonably constructible, and how can these be compared to uncoordinated action by nation-states, i.e., what are the costs as well as the benefits of “going international”?

Clearly, there are more questions, but we can begin with these.

(1) First, is there a need for government action? If one begins with the familiar assumptions of market-oriented economics, the theory is to avoid government intervention and let the market operate. But a classic exception to this is “market failure,” and competition problems always appear on the classic lists of market failure. So the next question becomes, how do you evaluate the problem of competition market failure? Historically, this has been done at the nation-state level, and many government officials, especially in the United States, have argued that current problems are all solvable by nation-state action (including unilateral extraterritorial actions) or, at most, a series of (mostly) bilateral procedural “cooperation agreements.” But examine what is happening to competition policy in the current state of globalization. Is a single supplier in a nation-state (“relevant market”) a monopoly? Obviously not, if open market borders have created a world market. Thus, a decision on market failure must take into account the structure of the world market. How should that judgment be made—by nation-states or through cross-border cooperation? And conversely, suppose several local suppliers seem to assure a competitive market in a nation-state, but when factors of globalization are recognized, it can be seen that competition is dangerously limited, either by cross-border business arrangements or by structures in the globalized market that constrain competition (e.g., government export subsidies, certain types of government procurement, needed economies of scale). Thus, one sees that the judgment of market failure itself now needs appreciation of the global conditions. Can this appreciation be accomplished by nation-states? If only a large and rich country can accomplish such appreciation, is that country the appropriate place to make decisions on government response, or are other, poorer societies at risk because the large and rich country can tilt its policies to achieve benefits for its home constituencies that may harm foreign societies?

(2) Suppose, one way or another, it can be seen that a certain sector of economic activity very much suggests market failure and the need for government responses. Can this re-

²⁴ Readers may wish to peruse an interesting article by Professor Daniel K. Tarullo on this subject, *Norms and Institutions in Global Competition Policy*, 94 AJIL 478 (2000).

sponse (criminal or civil liability and other kinds of reactions) be adequately accomplished by nation-states? If not, then some type of international response needs to be considered.

(3) Nation-states can make a variety of possible responses, such as regulate (norms with sanctions), tax, subsidize, and restructure the market rules and organization (e.g., tradable rights). But at the international level, many of these tools are effectively not available. Indeed, in most situations (including those involving the WTO) only the first of these is reasonably available. Consequently, it must be asked if that one tool (regulation by international norms coupled with a rule-oriented dispute settlement mechanism or other means that will create reasonable compliance) will operate efficiently to redress the market failure.

(4) Thus, the problem demands an appraisal not only of the need for international action, but of whether any international institution (current or future) is likely to be able to provide necessary action. And this appraisal must also examine the dangers or costs of such international action. What is the decision-making structure of the international institution? Is it democratic? Is it paralyzed by a consensus procedure (which risks that holdout governments will make action hostage to specific, unilateral goals)? Does it tilt too strongly toward the rich or toward the poor countries? Does it have important policy advocacy inputs such as those that only "civil society" (nongovernmental actors) can provide? Moreover, these features must be matched with the type of government action contemplated. For example, if the "rules" of the subject are generally expressed in broad, somewhat ambiguous terms (like some antitrust statutes), national legal systems may be trusted to "fill in the gaps," while international juridical systems would have great difficulty doing so in a manner acceptable to "sovereign nation-states."

Among the characteristics of any international institution targeted to perform needed international action must also be counted those regarding good governance and democratic legitimation, as mentioned earlier. For example, one proposal for internationally addressing competition policy is to establish a "forum" that could (currently at least) be independent of any existing institution, including the WTO. One reason for this approach might be a desire to open up a means of discourse with "civil society," with important access and transparency for some NGOs. The fact that the WTO has heretofore been so negative about such an approach may be an important reason to avoid establishing this subject matter in the WTO context.²⁵

In the specific case I used here as an illustration, there are many more complexities. Maybe certain parts of the problem areas can be "internationalized" but not others (e.g., merger control; cf. cartel control). Furthermore, in the case of the WTO, it must be recognized that many competition policy issues are *already* a concern of that organization, with dozens (I have counted almost sixty) of treaty clauses in the GATT, the services and intellectual property agreements, and new GATT ancillary agreements addressing such policy issues. In short, as to competition policy being dealt with by the WTO Agreements, there is *already* a substantial position for the WTO (those who resist are too late!).

I admit that this brief discourse does not solve the problem posed, but I hope it points in a direction with a pragmatic focus, based on empirical information and much analysis of the institutional characteristics at different government levels, on the factors that need to be considered (the approach I describe here could be complemented by some of the analysis mentioned in the other articles of this grouping).

In conclusion, does it not make sense to go about these "linkage" issues in a manner quite different from that used in the five texts subject to scrutiny here, and instead use a sort of

²⁵ See INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, U.S. DEP'T OF JUSTICE, FINAL REPORT, ch. 6 (2000). See also the ideas expressed by European Union Commissioner of Competition Policy Mario Monti in his keynote address at a conference entitled Towards Global Competition held by the British Institute of International and Comparative Law (May 18, 2001) (notes of speech on file with author).

“bottom-up” approach? Could we not begin with a statement of a specific problem and the institutional needs to solve the problem, and then analyze the various factors that should go into solving the problem, including the question of how to allocate the government decision-making authority that is best suited to achieving such a solution? Of course, the above example illustrates the start of that process. But a similar approach could be used for other subjects such as environmental and labor standards, or even human rights norms. Each case would be likely to require different considerations, and would call for an evaluation of the need for any international response (e.g., in the light of “Prisoners’ Dilemma” or public choice considerations, as well as globalization effects). Then an examination of the existing or potential international mechanisms reasonably available for a response would be needed. This would clearly call for an appraisal of the risks of national and international government actions. How could potential power allocations to different institutions be abused? Could a subject “link” become utilized as a surrogate or subterfuge for taking action for undesirable reasons, such as protecting domestic producer constituents from competition in a manner that would incur cost or harm to other domestic constituents, and also possibly to interests beyond the border of the acting state (i.e., protectionist actions, or as GATT Article III specifies, those done “so as to afford protection to domestic production”)?

There is much yet to analyze, much yet to do. One of the important worries is whether, given the significant inadequacies of the existing international institutions, and the often extreme hostility to creating any new institution, it is reasonably possible to see any resolution to the dilemma of international coordination needs. Part of that dilemma is the skepticism about whether any existing or plausible new institution has the capacity to appropriately address the policy landscape that I have outlined above.